IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.109 OF 2005

Abhinandan Commercial Centre Pvt.Ltd. ...Appellant

Vs.

The Municipal Corporation of
Greater Mumbai ...Respondent

Mr.J.J.Shah for the Appellant
Mr.J.Xavier for the Respondent.

CORAM: A.S.OKA, J.

DATED: FEBRUARY 7,2005.

JUDGMENT:

1. On 1st February 2005 I had extensively heard the Appeal. As sufficient time was not available on that day, Appeal was kept today for dictation of Judgment.

2. The challenge in this Appeal is to the order dated 13th January 2005 passed by the learned Judge of City Civil Court by which a prayer of the Appellant -Plaintiff for ad-interim injunction has been partly granted. The challenge in the suit filed by the Appellant in the City Civil Court is to the notice dated 30th September 2004 issued under Section 351 of M.M.C.Act, 1888 (hereinafter referred to as the said Act) and the order dated 10th November 2004 passed by the Assistant Commissioner of the Respondent-Corporation on the said notice. The said notice relates to the structure called as

the terrace room and three sheds which are described in the notice dated 30th September 2004. The learned Judge has protected only the terrace room from demolition.

3. The learned Counsel for the Appellant submitted that ad-interim relief should have been extended even to the three sheds as the same are in existence from 1975-1976. He placed reliance on a Judgment of the learned Single Judge of Gauhati High Court reported in 1996 A.I.H.C. page No. 2126 (Jadhav Chandra Das Vs. Gauhati Municipal Corporation and others) Placing reliance on the said Judgment he submitted that the action of demolition ought to have been taken within a reasonable time and what should be the reasonable time is governed by Article 137 of the Limitation Act, 1963. He submitted that if the three sheds are in existence for sufficiently long time, the learned Judge should have protected the sheds pending final hearing of the Notice of Motion. The learned Counsel for the Respondent-Corporation submitted that the documents annexed to the plaint itself show that the three sheds have been unauthorizedly constructed. He submitted that no interference is called for.

4. With a view to appreciate the submissions of the learned Counsel for the Appellant it will be necessary to refer to the averments made in the plaint. The Plaintiff claims to have become owner of the entire property on which suit

structure is situated in the year 1974 by virtue of a registered deed of conveyance. He has stated that the building plans were submitted by him through his architect M/s.N.M.Barai and the approval was granted by the Respondent-Corporation to the said plans. He also relied upon the occupation certificate dated 18th November 1974. It is stated in the plaint that the terrace room and the three sheds are situated on the premises annexed to the main building and the said premises consists of ground and mezzanine floor. In paragraph No.4 of the plaint, it is stated that to avoid misuse and nuisance in front of the terrace room, the Appellant constructed a shed with M.S.Grills and tin sheet roof in the year 1975. It is stated that the terrace room is assessed to the municipal taxes. It is pertinent to note that there is no averment made in the plaint that the sheds in dispute have been constructed after obtaining permission of the Respondent-Corporation. There is no specific averment that the plan which was submitted by the Appellant through M/s.N.M. Barai which was allegedly sanctioned was also in respect of the three sheds.

5. The Assessment record produced by the Appellant for the period between 1976 to 1982 shows that the terrace room has been assessed to municipal taxes. The extract of inspection register of the year 1981-1982 of the Respondent-Corporation shows the existence of the suit sheds. Thus, the suit sheds were not in existence in the year up to the year 1982. As

the existence of terrace room was shown in the year 1976, the learned Judge has protected the same. The Appellant has not produced the sanctioned plan. As stated earlier it is not the case that the suit sheds are constructed in accordance with sanctioned plan. Moreover, the existence of the sheds is not shown in the assessment record prior to the year 1981-1982.

6. In so far as the Judgment of Gauhati High Court is concerned, it is to be noted here that the section 137 of the Limitation Act, 1963 cannot govern the action of demolition on the part of the Respondent-Corporation. Article 137 is the article which governs the legal proceeding instituted by the parties in the Court of law. I am in respectful disagreement with the view taken by the learned Single Judge of Gauhati High Court. It will not be out of place here to mention the view taken by the Apex Court in case of M.I.Builders Pvt.Ltd. Vs. Radhey Shyam Sahu reported (1999) 6 S.C.C. page No.464 and particularly in paragraph No.73 thereof. The said paragraph read as thus :

> "73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which

> encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

7. The Apex Court has thus come to the conclusion that if illegal structure has been erected without permission of the Competent Authority, it has to be demolished. I am of the view that unless it is shown that illegal structure can be tolerated in accordance with any of the existing policies of the Respondent-Corporation, it is very difficult to accept the plea that as the construction is standing for a long time, it should be protected.

8. It is to be borne in mind that grant of temporary injunction is an equitable and discretionary relief. An equitable relief cannot be granted which will have effect of encouraging the illegality. Therefore, the learned Judge was right when three suit sheds were not protected and the protection was confined to terrace room. The Appellant has

not made out a case for grant of equitable relief of ad-interim injunction as regards the sheds. The reliance placed by the learned Counsel for the Appellant on the Judgment of Gauhati High Court is totally misplaced.

9. Hence, there is no merit in the Appeal. Appeal is dismissed with no order as to costs.

Judge.